

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SMITH BEACH ATWOOD,

Defendant-Appellee.

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UNPUBLISHED  
October 27, 2000

No. 224315  
Washtenaw Circuit Court  
LC No. 99-012337-FC

Before: Griffin, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the sentence of one day to one year and one day for defendant's plea-based conviction of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). We vacate the sentence for that conviction only and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with one count of CSC I and six counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). It was alleged that over an eight-month period defendant engaged in one act of digital penetration and several acts of sexual contact with his fourteen-year-old victim, his adopted daughter. The trial court evaluated the case pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), and indicated that it would be inclined to sentence defendant to a maximum term of one year and one day for the conviction of CSC I, and to five years' probation for the convictions of CSC II. The trial court relied on information detailing defendant's cooperation with the police, his strong community and family support, including support from the victim, and psychological reports which detailed defendant's remorse and concluded that there was little or no chance of the behavior being repeated. When the parties were unable to reach a plea agreement, defendant entered a plea of nolo contendere to each charge. The court relied on the police report to establish a factual basis for the plea.

The sentencing guidelines for the offense of CSC I as calculated by the trial court recommended a minimum sentence range of four years and three months to seven years and one month. Because the offense of CSC I was committed after January 1, 1999, the legislative sentencing guidelines applied.

MCL 769.34(2); MSA 28.1097(3.4)(2). Noting that it was authorized to depart from the guidelines if it found that substantial and compelling reasons existed to do so, MCL 769.34(3); MSA 28.1097(3.4)(3), the court concluded that downward departure was warranted. The court relied on the strong support for defendant voiced by the community and his family, including the child victim's alleged desire that defendant not be incarcerated, a psychological evaluation which concluded that the victim did not require treatment and the psychological reports concluded that it was unlikely defendant would repeat his behavior. The court sentenced defendant to one day to one year and one day in prison for the conviction of CSC I, with credit for one day, and to terms of five years' probation for the convictions of CSC II. On appeal, plaintiff challenges only the sentence imposed for the conviction of CSC I.

A court may depart from the legislative sentencing guidelines range if it has a substantial and compelling reason to do so. MCL 769.34(3); MSA 28.1097(3.4)(3). A court may not depart from the legislative sentencing guidelines range based on certain specified factors, including, inter alia, race and gender. MCL 769.34(3)(a); MSA 28.1097(3.4)(3)(a). Otherwise, what constitutes substantial and compelling factors supporting departure is not defined in the context of the legislative sentencing guidelines.

Plaintiff argues the trial court abused its discretion by imposing a disproportionately lenient sentence for the conviction of CSC I. We agree.

We hold the minimum sentence of one day in prison was disproportionately lenient and therefore invalid. *People v Lankey (After Remand)*, 198 Mich App 187; 497 NW2d 571 (1993). The minimum term constitutes a downward departure of more than four years. Notwithstanding the fact defendant had strong family support and the other factors cited by the trial court, the sentence falls short of what any reasonable person would consider an appropriate response to the offense and the offender. *People v Coles*, 417 Mich 523, 543; 339 NW2d 440 (1983). We recognize defendant pleaded nolo contendere pursuant to a *Cobbs, supra*, agreement, in which the court determined that a maximum term of one year and one day would be appropriate. That maximum term itself is well below the sentencing guidelines, and imposition of a minimum term that complied with *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972), would still constitute the imposition of a disproportionately lenient sentence. On remand, defendant shall have the option to withdraw his plea to the charge of CSC I. *Cobbs, supra*, 283.

Defendant's sentence for the conviction of CSC I is vacated, and this case is remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin  
/s/ Mark J. Cavanagh  
/s/ Hilda R. Gage